United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL **74-2425**

United States Court of Appeals

FOR THE SECOND CIRCUIT

SALVATORE A. GALIMI,
Plaintiff,

against

JETCO, INC.,
Defendant-Appellant,

and

RICHARD MOORE,
Defendant,

and

JETCO, INC.,
Third-Party Plaintiff-Appellant,

against

JAMES HODGES,
Third-Party Defendant,

and

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING
SUGGESTION FOR REHEARING EN BANC

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The Issue

Third party plaintiff-appellant Jetco, Incorporated respectfully petitions the United States Court of Appeals, Second Circuit for a rehearing of the within appeal, or in the alternative for rehearing en banc.

Ba is for Petition

The issues here presented are patently far ranging in the area of torts, contribution between joint tort feasors, the obligations of the United States of America under the Federal Tort Claims Act, the rights of citizens under the New York State doctrine of *Dole* v. *Dow Chemical Co.*, 30 NY 2d 143 (New York Court of Appeals 1973), and the limitations of the Federal Employees Compensation Act. 5 USC Sect 8116(c).

The parties are in agreement that this appeal presented for resolution a question of law never definitively passed upon in this Circuit, and inconsistently decided in other Circuits.

Judge Gurfien, writing for this court stated:

> "This case presents one of those recurring puzzling situations where a federal statute has met differing interpretations in several circuits on a question that requires legislative resolution but which Congress has, nevertheless, not yet addressed."

A panel of this court consisting of Circuit Judges MEDINA, OAKES and GURFIEN have addressed the legal issues from a point of view which differs from the several differing interpretations of the other Circuits which have met this issue. It is urged that the matter lends itself to further analysis by the full Second Circuit.

The decision of the aforementioned panel has passed over several arguments presented by appellant, which will be enumerated infra. The affirmance herein is predicated upon the following pertinent language in the panel's opinion, at page 2661:

> "It thus appears that the analysis applied by the majority of circuits which have considered the questions *would most probably* be adopted by the Supreme Court were the issue presented directly to it."

It is respectfully urged that the case *sub judice* may be presented to the Supreme Court for certiorari, in which event it would be desirable for the issues to evolve from the full Second Circuit, as an expression of this circuit's views on a "recurring puzzling situation".

Arguments of Appellant Not Covered by the Panel's Decision

1. Appellant urged that the government's interpretation of the FECA is in essence an amendment of the Federal Tort Claims Act (Appellant's brief Point I). The panel held that:

> "Congress retains the power to modify the FTCA by means of other statutes. Whether it has done so in the manner asserted by the United States in this case is a question of federal law, separate and prior to the question of employer's liability under state law." (2654)

While the panel has addressed itself to the power of Congress to modify FTCA by FECA, it has not addressed itself to the basic issue as to whether Congress did, *in*

fact do so. Appellant has urged that Congress did not do so. That legal issue is left unresolved by the opinion herein.

A resolution of this aspect of the overall problem is of universal importance, transcending the narrow issue of liability or damages in this case. If in fact Congress has by enactment of 5 USC 8116 (c) amended the FTCA, in that a particular class of litigants are deprived of FTCA rights, this deprivation should be clear, and unambiguous. Citizens can adjust their rights and obligations, where there is foreknowledge (e.g. by contract or appropriate insurance coverage). The issues at bar present a classic case of uncertainty and ambivilance, made more confusing by the "differing interpretations in several circuits".

2. The panel cited the recent Supreme Court case of *Cooper Stevedoring Co. Inc.* v. *Kopke,* 417 U.S. 106 (1974). Admittedly, the conclusion which the panel drew from the Cooper case represents:

> "A slightly different approach is to consider the effect of the provision as a whole rather than the specific language just noted." (2656)

At bar, the government relied upon the *specific* language of the F.E.C.A.; this panel has suggested in its opinion that the so-called exclusive remedy provisions of F.E.C.A. are in fact a statutory amendment of the Federal Tort Claims Act. Absent the statutory amendment to FTCA the government would have nothing to fall back on in support of its claim of immunity from suits for contribution. It is most strenuously urged that there can be no "different approach". We are dealing with statutory language in the Tort Claims Act, we are dealing with substantial rights of a citizen pursuant to the government's waiver of immunity. These rights can only be abrogated,

or modified, by statutory enactments which are in *pari causa* with the enactment sought to be abrogated or modified. Thus, it is most respectfully urged, our courts lack the jurisdiction to modify a statute (FTCA) by reference to an overall plan or design, notwithstanding the inherent merits of such plan or design.

If Congress, by the enactment of a specific statute, has disturbed a valid or rational plan or scheme, it is for Congress to undo its error and not the court.

Appellant urges that our courts are legally committed to consider the specific language of a statute rather than attempt to deal with the problem "as a whole". The rule of *ejusdem generis* dictates that the "any other person otherwise entitled" language of the FECA be the controlling determinative in resolving the problem at bar. To do otherwise is to legislate by judicial fiat, rather than by proper legislative enactment. The panel of this court properly states that:

> "Appellant Jetco relies on dicta in several cases in the Supreme Court to support its view that the language of the exclusive remedy provision does not embrace a claim for contribution against the United States by a joint tort feasor unrelated to the injured employee." (2657)

Technically, the language cited by appellant in its brief in this regard is dicta. However, it is dicta which should afford the courts guidance and direction. This so-called dicta is actually a rejection of the gravamen of the government's contentions at bar.

It is respectfully urged that the learned panel has evolved an approach not presented by the government, nor directly by any other cases relied upon by the government. The use of the word "evolved" in the forego-

ing statement is not intended as a perjorative. It is urged, however, that the legal novelty, and extreme importance, of this determination suggests that this matter be considered by the Second Circuit en banc.

3. Appellant has raised questions of constitutional law with respect to equal protection. The District Court rejected the argument as invalid. The panel made no reference to that position, either by way of acceptance, modification or rejection. It is most respectfully urged that this Court reconsider the constitutional question, or alternatively that the matter be reexamined by the Second Circuit en banc.

Respectfully submitted,

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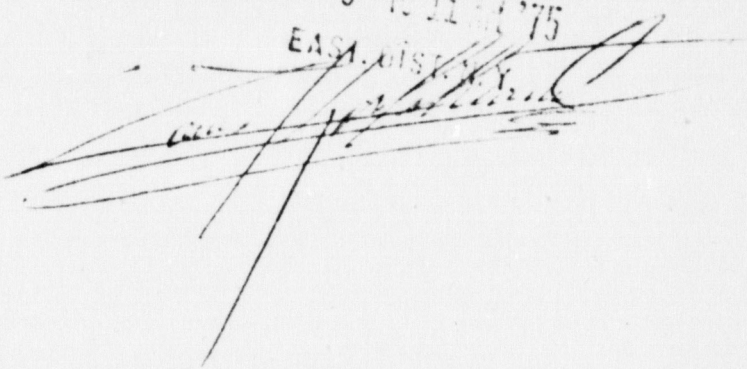
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